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Supreme Court, U.S.
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No. _____

In the Supreme Court of the United States

October Term, 1991

ERWIN RAUTENBERG, et al.,

Petitioner,

v.

UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA,

Respondent.

and

UNITED STATES OF AMERICA, et al.

Real Parties in Interest

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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CONTENTS REPRODUCED FROM FURNISHED PRETYPED COPY

QUESTION PRESENTED

Can a Court of the United States, consistent with due process of law, turn a protective order into a secret decree, denying the party required to obey it full access to it and forbidding that party from disclosing its terms or existence to others?

TOPICAL INDEX

Page

QUESTION PRESENTED i

TABLE OF AUTHORITIES CITED iii

PETITION FOR WRIT OF CERTIORARI 1

ORDERS BELOW 2

JURISDICTION 2

CONSTITUTIONAL PROVISIONS INVOLVED 3

STATEMENT OF THE CASE 3

REASONS FOR GRANTING REVIEW 7

INTRODUCTION 7

I. THIS COURT SHOULD GRANT REVIEW IN ORDER TO DETERMINE WHETHER COURTS CAN, CONSISTENT WITH DUE PROCESS OF LAW, DENY LITIGANTS FULL ACCESS TO ORDERS WHICH THOSE LITIGANTS MUST OBEY UNDER THREAT OF PUNISHMENT FOR CONTEMPT. 8

II. THIS COURT SHOULD GRANT REVIEW IN ORDER TO DETERMINE WHETHER A PRIOR RESTRAINT FORBIDDING LITIGANTS FROM MAKING PUBLIC THE TERMS OF THE ORDERS IMPOSED UPON THEM CAN BE JUSTIFIED BY A CLAIM OF THE STATE SECRETS PRIVILEGE SUCH AS THAT MADE HERE. 14

CONCLUSION 23

APPENDIX A: Order Under Seal Granting Petition for Writ of Mandamus DATED: June 1, 1990 ..... A1

APPENDIX B: Order Re: State Secrets Privilege Filed In Camera and Under Seal DATED: August 12, 1990 ..... B1

APPENDIX C: Order Denying Supplemental Petition for Writ of Mandamus DATED: February 13, 1991 ..... C1

APPENDIX D: Order Under Seal Denying Supplemental Petition for Writ of Mandamus D1

TABLE OF AUTHORITIES CITED

Page

Cases

Air-Sea Forwarders, Inc. v. Air Asia Co., Ltd.,
880 F.2d 176, 179-180 (9th Cir. 1989) 3, 4, 5, 19

Butterworth v. Smith,
110 S.Ct. 1376 (1990) 15, 16, 17, 20, 23

Connally v. General Construction Co.,
269 U.S. 385, 391 (1926) 9, 11, 12

Doe v. State of Florida Judicial Qualifications Commission,
748 F.Supp. 1520 (S.D.Fla. 1990) 15

Hudson River Sloop Clearwater v. Dept. of the Navy,
891 F.2d 414 at 421 (2d Cir. 1989). 18

International Longshoreman Association v. Philadelphia Mar. T.A.,
389 U.S. 64, 76, 88 S.Ct. 201, 208 (1967) 9, 12

Levine v. U.S. District Court,
764 F.2d 590 (9th Cir. 1985) 17, 20

National Lawyer's Guild v. Attorney General,
96 F.R.D. 390, 400 (S.D.N.Y. 1982) 21

Near v. Minnesota,
283 U.S. 697 (1931) 17

New York Times v. United States,
403 U.S. 713 (1971). 17

Perfect Fit Industries, Inc. v. Acme Quilting Co.,
646 F.2d 800 (2d Cir. 1981) 8

Reynold v. United States,
192 F.2d 987 (3d Cir. 1951) 18

Seattle Times Co. v. Rhinehart,
467 U.S. 20 (1984) 14, 15

Smith v. Daily Mail Publishing Co.,
443 U.S. 97 ..... 15, 17

United States v. Gilbert,
813 F.2d 1523 at 1530 (9th Cir. 1987) 11

United States v. Lane,
759 F.2d 618 12

Zuckerbraun v. General Dynamics Corp.,
755 F.Supp. 1134, 1137 (D.Conn. 1990). 18

Constitutions

United States Constitution
First Amendment 3

United States Constitution,
Fifth Amendment 3

United States Constitution
Seventh Amendment 7

Other Authorities Cited

Fuller, Positivism and Fidelity to Law,
71 Harv.L.Rev. 630 (1958). 24

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PETITION FOR WRIT OF CERTIORARI

Petitioners, AIR-SEA FORWARDERS, its president, ERWIN RAUTENBERG, and its attorney, MATTHEW STEINBERG, respectfully pray that a writ

of certiorari issue to review the decision of the United States Court of Appeals for the Ninth Circuit, filed on April 1, 1991, denying Petitioner's petition for writ of mandamus. Petitioner's petition for rehearing from that order was denied on April 29, 1991.

ORDERS BELOW

The June 1, 1991 order of the United States Court of Appeals for the Ninth Circuit conditionally granting the writ of mandamus is attached hereto as Appendix A. The August 21, 1990 order of the District Court upholding the protective order as necessary to the protection of the state secrets privilege is attached hereto as Appendix B. The Ninth Circuit's February 13, 1991 order denying Air-Sea's supplementary writ petition is attached hereto as Appendix C. The Ninth Circuit's April 1, 1991 order granting reconsideration and again denying the writ is attached hereto as Appendix D, and the order denying Petitioners' petition for rehearing on April 29, 1991 is attached as Appendix E.

JURISDICTION

The United States Court of Appeals for the Ninth Circuit denied the petition for rehearing on April 29, 1991. The jurisdiction of this court is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, Amendment I:
"Congress shall make no law . . . abridging the freedom of speech . . . ."

United States Constitution, Amendment V:
"No person shall be . . . deprived of life, liberty, or property without due process of law . . . ."

United States Constitution, Amendment VII:
"In suits at common law, where the value in controversy shall exceed twenty dollars, the right to trial by jury shall be preserved . . . ."

STATEMENT OF THE CASE

Petitioner Air-Sea Forwarders Inc. ("Air-Sea") was an international freight forwarder and customs house broker for Air Asia Co., Ltd. and its predecessors ("Air Asia") from 1950 until July 27, 1981. Until 1975, Air Asia was "owned secretly by the Central Intelligence Agency" and operated on Taiwan primarily as an "aircraft repair and maintenance facility" for Air America, "the CIA's secret Southeast Asian air force . . . ." In 1975, Air Asia was acquired by E-Systems Inc. *Air-Sea Forwarders,*

Inc. v. Air Asia Co., Ltd., 880 F.2d 176, 179-180 (9th Cir. 1989).

On August 12, 1981, Air-Sea filed an action against Air Asia asserting that the termination was in violation of Air Asia's contract obligations. 880 F.2d 176, 180.

E-Systems responded to Air-Sea's pretrial discovery requests by moving for a protective order to restrict Air-Sea's access to confidential business information. In an *in camera, ex parte* hearing, the United States then presented classified declarations in support of the issuance of a protective order (Government Response to Petition for Mandamus, hereinafter *Response*, p. 3).

The District Court issued this protective order on November 6, 1984. This order, according to the Government, "directed that no discovery be had and no evidence adduced at trial concerning certain contacts with foreign governments" or as to "whether a confidential relationship existed between the United States and certain specified private parties" (Response, p. 5).

Further, the court denied the Air-Sea full access to the order itself. Petitioners Rautenberg, Air-Sea president, and his counsel Matthew Steinberg were allowed to "examine" the protective order, but not to have a copy of it. In addition, the court ordered them not to disclose to others the terms of the order or the

participation of the government in the case (Response, p. 5).

Air-Sea attempted unsuccessfully to have the order vacated on March 18, 1986 (Response, p. 7). The court amended the order on November 21, 1985, and it is currently operative in its amended form (Response, p. 10).

At the conclusion of the trial, the jury awarded Air-Sea $216,151.50 in compensatory damages for breach of contract, and $6,000,000 in punitive damages for the bad faith denial of the existence of the contract. The district court then granted Air Asia's motion for judgment notwithstanding the verdict as to the bad faith claim, and a new trial as to the breach of contract claim. 880 F.2d 176, 181. On appeal, the Ninth Circuit reversed the judgment j.n.o.v., and affirmed the alternative grant of a new trial as to all issues. 880 F.2d 176, 181-90.

In the course of its opinion, the Ninth Circuit noted that "the district court was in communication with government lawyers concerning the role of classified information," and that "the district court entered a supplemental protective order regulating the admission of certain classified evidence . . . ." 880 F.2d at 192.

In preparation for the new trial on remand, Air-Sea again moved to vacate the order, and the motion was

again denied, on November 6, 1989 (the transcript of the hearing was attached to Air-Sea's Emergency Petition for Writ of Mandamus, hereinafter Petition, as Exhibit "A").

After unsuccessful efforts to negotiate mutually acceptable modifications of the order (Declaration of Matthew Steinberg, attached to Petition, para. 15) Petitioners filed their emergency petition for mandamus asking the Ninth Circuit to vacate the order on April 6, 1990.

On June 11, 1990, the Ninth Circuit issued an order granting the writ petition unless the government filed a certification in support of its state secrets claim with the district court, in which case the district court was to rule on the claim (App. A).

On June 29, 1990, the government submitted the Declaration of

asserting the state's secret privilege (Government Response to Supplemental Petition for Writ of Mandamus, hereinafter "Supplemental Response", p. 11).

The declaration recited that Air Asia had been a proprietary of the CIA, but that the CIA had sold all outstanding shares to E-Systems in 1975 and that "[s]ince that time, CIA has had no relationship with Air Asia."

then invoked the privilege as to

'attached

to Supplemental Response).

On August 21, 1990, the district court issued its order upholding the government's claim of the state secrets privilege, and finding the protective order no more restrictive than necessary to protect that privilege (App. B).

On October 11, 1990, Petitioners filed their Supplemental Petition for Writ of Mandamus, again asking the Ninth Circuit to vacate, or at least to modify, the protective order.

On February 13, 1991, the Ninth Circuit denied the petition (App. C). By order filed on April 1, 1991, the Ninth Circuit granted Petitioners' motion for reconsideration, but again denied the petition (App. D). On April 29, 1991, the Ninth Circuit denied the petition for rehearing and suggestion for rehearing en banc (App. E).

REASONS FOR GRANTING REVIEW

INTRODUCTION

The protective order challenged here is problematic in many ways, but most strikingly in that it is, for

Petitioner Erwin Rautenberg, a kind of secret law: a standard by which he must regulate his life under threat of punishment for contempt, but to which he is denied full access, and which he cannot disclose to others. In what follows, Petitioners show how these limitations on access to, and disclosure of, the order violate Petitioners' fundamental Constitutional rights, and require review by this Court.

I. THIS COURT SHOULD GRANT REVIEW IN ORDER TO DETERMINE WHETHER COURTS CAN, CONSISTENT WITH DUE PROCESS OF LAW, DENY LITIGANTS FULL ACCESS TO ORDERS WHICH THOSE LITIGANTS MUST OBEY UNDER THREAT OF PUNISHMENT FOR CONTEMPT.

The most disturbing aspect of the protective order is that it denies those who must obey it full access to it.

A party must have notice of a court order in order to be held to its terms, but, having learned of the existence of an order, the party has the responsibility of making appropriate efforts "to ascertain the terms of any order entered against" him. *Perfect Fit Industries, Inc. v. Acme Quilting Co.*, 646 F.2d 800 (2d Cir. 1981).

Here, Petitioners are threatened with contempt for violating an order twelve or more paragraphs in length (Declaration of Matthew Steinberg attached to Supplemental Petition, para. 11), of which they cannot have a copy, and of which neither Petitioner Rautenberg nor his attorney is allowed "to conduct a free, careful, deliberative and unsupervised" review (Declaration of Matthew Steinberg attached to Supplemental Petition, para. 8). At one and the same time, then, the order threatens them with penalties for violating its provisions, and deprives them of the ability to "to ascertain [its] terms" with certainty. See *International Longshoreman Association v. Philadelphia Mar. T.A*, 389 U.S. 64, 76, 88 S.Ct. 201, 208 (1967); *Connally v. General Construction Co.*, 269 U.S. 385, 391 (1926).

A comparison of the references made to the order in the pleadings shows that the problem of uncertainty about its scope and content is far from theoretical.

Mr. Rautenberg could remember only that he was not to talk about

, and that

---

[1]Mr. Rautenberg has no knowledge of any classified information, and never had any access to such information (Declaration of Erwin Rautenberg attached to Petition, paras. 15, 18). His firm, Air-Sea Forwarders, has never handled any classified or secret shipments, and, on the

there was something about the destination of shipments (Declaration of Erwin Rautenberg attached to Petition, para. 12).

Rautenberg's attorney, Steinberg, on the other hand, remembered the order to preclude disclosure of "confidential business intercourse" between and foreign governments (Declaration of Matthew Steinberg attached to Supplemental Petition, para. 10).

The Government, in its allusions to the content of the order, offered a description which, even allowing for its purposeful vagueness, suggests that the actual order may differ to an uncertain extent from either Rautenberg's or Steinberg's recollections:

> "[The order] directed that no discovery be had and no evidence adduced at trial concerning certain contacts with foreign governments; it also placed similar limitations on disclosure of information pertaining to whether a confidential relationship existed between the United States and certain specified private parties."
>
> Response, pp. 4-5.

---

contrary, has always treated all shipments in the completely open manner prescribed by law for customs brokers and freight forwarders ((Supplemental Declaration of Erwin Rautenberg attached to Supplemental Petition, para. 3).

The nature of the dilemma into which this secret decree places Rautenberg and his attorney becomes clearer when their inability to know the content of the order with certainty is put in the context the government's warnings that even *inadvertent* violations of it may be punished with contempt (Exhibit D to Supplemental Petition, p. 7). It is the Kafkaesque dilemma of a person who is haunted by the fear that he may at any moment incur guilt for violating a rule he cannot remember.

The due process clause forbids our government from placing anyone in such a dilemma:

> "As a matter of due process, no one may be required at the peril of loss of liberty to speculate as to the meaning of penal statutes."

United States v. Gilbert, 813 F.2d 1523 at 1530 (9th Cir. 1987).

A criminal statute must therefore be declared void if it is so vague that,

> "men of common intelligence must necessarily guess at its meaning and differ as to its application."

Connally v. General Construction Co., 269 U.S. at 391, *supra*.

The requirement of "fair warning" in a criminal statute has been described as the "first essential of due process," *United States v. Lane*, 759 F.2d 618 at 622, but it is founded on an even broader and more basic doctrine, which this Court first enunciated and applied in a contempt case:

> "The most fundamental postulates of our legal order forbid the imposition of a penalty for disobeying a command that defies comprehension." *International Longshoreman Association v. Philadelphia Mar. T.A*, 389 U.S. 64 at 76, 88 S.Ct. 201 at 208, *supra*.

In striking down a court order it found to be insufficiently specific in its terms, this Court warned in *International Longshoreman* that,

> "The judicial contempt power is a potent weapon. When it is founded upon a decree to vague to be understood, it can be a deadly one."
>
> 389 U.S. at 76, 88 S.Ct. at 208.

Here, Rautenberg and his attorney must "speculate" about the content of a decree, "guess at its meaning and differ as to its application," not because of its inherent vagueness, but because the court has, at the government's

request, placed severe restrictions on the ability of those who must live under it to know what it says.

The result is the same. Here, as in the case of an inherently vague order[2], the vice is that people must act at their peril though denied any certain knowledge of the actions they must avoid. Here, Rautenberg lives under the threat that he will incur the punishment of contempt for an unintentional violation of an order the text of which is not immediately available to him, so that he cannot know its scope and content with certainty at the moments when he most needs its guidance.

This Court should grant review in order to explore the special problems raised by this novel form of the familiar vice of vagueness, in which an order is rendered "to vague to be understood," not by the inherent ambiguity of its provisions, but by denial of full access to the content of those provisions.

---

[2]The protective order here appears to suffer from this vice as well, but the limits on access to it preclude the careful study required to determine this with certainty.

II. THIS COURT SHOULD GRANT REVIEW IN ORDER TO DETERMINE WHETHER A PRIOR RESTRAINT FORBIDDING LITIGANTS FROM MAKING PUBLIC THE TERMS OF THE ORDERS IMPOSED UPON THEM CAN BE JUSTIFIED BY A CLAIM OF THE STATE SECRETS PRIVILEGE SUCH AS THAT MADE HERE.

The regime of secrecy which cloaks the order is completed by a provision which forbids Petitioners from disclosing to others what they are able to remember of the terms of the order, as well as its existence, and even the fact that the government intervened in this litigation to obtain it.

This provision presents the question of whether, and under what circumstances, the courts of the United States can join with the government to keep orders limiting the liberty of private parties from public view, forbidding those whose rights are restricted by such orders from public disclosure of them.

This Court held, in *Seattle Times Co. v. Rhinehart*, 467 U.S. 20 (1984), that a protective order which is supported by good cause and extends *only* to information gained from discovery is consistent with the First Amendment.

The provision challenged here raises, for one thing, a question not dealt with in *Rhinehart*: the validity under the First Amendment of an order which prohibits public disclosure of information *not* gained through discovery, specifically the disclosure of the protective order itself.

The district court in the recent case of *Doe v. State of Florida Judicial Qualifications Commission*, 748 F.Supp. 1520 (S.D.Fla. 1990), held that, at least where the information governed by the protective order was "about a matter of public significance", this Court's decisions in *Smith v. Daily Mail Publishing Co.*, 443 U.S. 97, and *Butterworth v. Smith*, 110 S.Ct. 1376 (1990) should govern, and that the order could not be valid "absent a need to further a state interest of the highest order."

In *Butterworth* the issue was the constitutionality of a Florida statute prohibiting a grand jury witness from ever revealing the content of his testimony in public. This Court followed *Smith* to hold that the statute could not constitutionally be applied to prohibit disclosure of the testimony after the expiration of term of the grand jury which heard it. In doing so, this Court explicitly distinguished *Rhinehart* on the basis that in *Butterworth* the information was gained by means *independent* of the discovery process. 110 S.Ct. 1376, 1381.

Like the statute in *Butterworth*, the provision of the protective order prohibiting disclosure of the order suppresses information "of public significance" which was gained by means independent of the discovery process.

The existence of the protective order *is* a matter of public interest. It discloses a governmental effort, carried out with the aid of the district court, to suppress information about matters which have already gained considerable public attention:

. It is also a matter of public interest precisely because the public in a democracy should know about the restrictions which courts may place upon the rights of private parties in the name of national security.

Further, Petitioners learned of the order, not as the fruit of its own *discovery* efforts, but because it was *imposed* upon them, as the result of a hearing in which they were not allowed to participate and of which they had no notice.

Applying the *Butterworth* principle, therefore, the prohibition on disclosure should not be upheld "absent a need to further a state interest of the highest order."

Because it prohibits public disclosure of information of public importance, the provision suppressing of communication about the order also falls within this ambit of another body of doctrine developed by this Court: that which relates to prior restraints on the freedom of speech. *Near v. Minnesota*, 283 U.S. 697 (1931); *New York Times v. United States*, 403 U.S. 713 (1971).

In *Levine v. U.S. District Court*, 764 F.2d 590 (9th Cir. 1985) the Ninth Circuit held that a protective order prohibiting participants in a judicial proceeding from making public disclosure of that proceeding to be a prior restraint. It held, therefore, that the order could be valid only if (1) the disclosures it prevented posed "either a clear and present danger or a serious and imminent threat to a protected competing interest," (2) the order was "narrowly drawn," and (3) "less restrictive alternatives were not available." 764 F.2d 590 at 595.

The prohibition on public disclosure of the order here satisfies neither this Court's *Smith-Butterworth* test nor that distilled from this Court's prior restraint decisions in *Levine*.

The "state interest of the highest order" which suppression of information about the order *purports* to serve is that in national security interest, as asserted in the

See *Reynold v. United States*, 192 F.2d 987 (3d Cir. 1951). The state secret privilege claim would also form the basis for a claim of clear and present danger or "serious and imminent threat to a protected competing interest" under *Levine*.

The order here reaches beyond the familiar realm of the state secrets privilege. The state secrets privilege is an *evidentiary* privilege. See *Zuckerbraun v. General Dynamics Corp.*, 755 F.Supp. 1134, 1137 (D.Conn. 1990). It is directed to limiting discovery, keeping secret matters out of evidence, and, at most, limiting the use of discovered material. Here, however, it purports to support an order which prohibits the out-of-court disclosure of information *not* learned through discovery: the existence and content of the protective order itself.

Assuming such an expansive use of the state secrets privilege is permissible, the national security needs which lie behind the privilege are not served by the provision forbidding Petitioners from making the order public here, because, the existence of the order and the context from

which it arose have already been "made public through official disclosures." *Hudson River Sloop Clearwater v. Dept. of the Navy*, 891 F.2d 414 at 421 (2d Cir. 1989).

Thus, the intervention of the government and the existence of the protective order were disclosed in the published opinion of the Ninth Circuit Court of Appeal in this case. 880 F.2d 176, 192.

So too, the content of the order (to the extent that appellate counsel can reconstruct it from his own recollections and the suggestions in the pleadings) reveals no more about government intentions and actions than is already obvious from the Ninth Circuit opinion and other official documents:

The government has an interest in maintaining the confidentiality about Air-Asia

In the words of

The farcical nature of this concern is made all the clearer by the fact that the relationships claimed to be secret here have been the subject of newspaper articles, popular books, and even motion pictures.

It follows that the other *Levine* criteria could not have been satisfied either. The order, far from being "narrowly drawn," prohibits speech with regard to the order as broadly as possible, and, like the statute in *Butterworth*, forever.

So too, there were "less restrictive alternatives" available to protect the asserted national security interest in keeping aspects of the relationship between the government and an order protecting only the *confidential* aspects of that relationship, and not the aspects of it which are already publicly known. Such an order would have been narrower in many respects, and would not have required a provision rendering *itself* secret.

While courts do not generally balance interests in adjudicating claims of the state secrets privilege, a consideration of the interests favoring disclosure "is relevant in determining how deeply the court should probe in satisfying itself that the privilege is properly invoked." *National Lawyer's Guild v. Attorney General*, 96 F.R.D. 390, 400 (S.D.N.Y. 1982).

It takes little probing to show that the claim of state secrets privilege made here offers no real basis for making the order secret. On the other side, there are not only fundamental free speech rights, but vital private interests as well. The secrecy order restricts Rautenberg's ability to protect his own interests in this case, and, because of its apparently "eternal duration" and unlimited scope, in related litigation as well. It restricts not only his ability to present relevant evidence, but also his ability to communicate fully with counsel and potential witnesses (Petition, pp. 14-15, 38-42, Supplemental Petition, pp. 42-47).

For example, the prohibition on disclosure of the existence or content of the order makes it entirely impossible for Rautenberg to prosecute his malpractice action against the attorneys who advised him to sign an acknowledgement of it (Petition, p. 40). Adherence to the protective order will also make it difficult for

Rautenberg to present his case in this action (Petition, p. 14-15) and has already led to the dismissal of another related action (Petition, p. 15).

Indeed, counsel who prepared the writ petitions and related pleadings in the Court of Appeals were denied access to the order they were challenging (Petition, p. 11), and received only *censored* copies of the government's pleadings, making this proceeding to challenge the order more difficult.

The provision forbidding Petitioners from public disclosure of the order thus presents this Court with broad issues arising from the application of this Court's *Butterworth* and prior restraint doctrines to judicial protective orders, and specifically to an expansive assertion of the state secrets privilege which goes beyond the realm of evidentiary privilege to control a party's out-of-court disclosure of information not gained through discovery.

Centrally, it raises the question of whether, and under what circumstances, a district court can be allowed to collaborate with the government to immunize actions affecting the liberty and property of private individuals from public scrutiny by using protective orders to render them secret.

CONCLUSION

Secret laws are the hallmark of a tyrannical society; they are inimical to the very concept of law. See Fuller, *Positivism and Fidelity to Law*, 71 Harv.L.Rev. 630 (1958). The question here is whether the provisions of the protective order which turn it into a secret law by (1) denying full access to it for those who must abide by it, and (2) forbidding them from disclosing it to others, can be justified by the expansive claim of state secrets privilege made by the government and accepted by the district court.

This Court should grant the writ and review the case on the merits in order to explore and resolve the problems raised by this secret decree. It will thereby ensure that government by secret court decree cannot become an accepted part of our legal structure by default.

Respectfully submitted,

ROBERT S. GERSTEIN
Counsel for Petitioner

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CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ERWIN RAUTENBERG, et al.,	)	No. 90-70177
	)	
Petitioners,	)	D.C. No. CV-81-4103-RAG
vs.	)	Central California
UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA,	)	ORDER UNDER SEAL
Respondent,	)	
and	)	
UNITED STATES OF AMERICA, et al.,	)	
Real Parties in Interest.	)	

Before: CANBY, WIGGINS and BRUNETTI, Circuit Judges

The petition for writ of mandamus is granted unless, within thirty days from the date of this order,

the government submits to the district court, with a copy to this Court, a certification supporting a claim of state secrets as prescribed by U.S. v. Reynolds, 345 U.S. 1, 7-8 (1952). If the government submits such a certification within the prescribed time, the district court shall rule forthwith on the government's claim of state secrets and on the continuing validity of the amended protective order. The government shall notify this court in writing, under seal, of the district court's ruling, at which time this court will dispose of the petition for writ of mandamus. This panel will retain jurisdiction.

This order shall be filed under seal, and counsel for petitioners shall not reveal this order or its contents to anyone not a party to this litigation.

APPENDIX A

APPENDIX B

B1

[TO BE FILED UNDER SEAL]

FILED
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CLERK, U.S. DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

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UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

AIR-SEA FORWARDERS, INC. Plaintiff, v. AIR ASIA COMPANY, LIMITED, et al., Defendants.	Civil Action No. 81-4103 (RAG) (Px) ORDER RE STATE SECRETS PRIVILEGE FILED IN CAMERA AND UNDER SEAL

APPENDIX B

HAVING CONDUCTED an in camera, ex parte review of the two classified declarations (the "Classified Declarations") that the United States has submitted in support of its claim of state secrets privilege, i.e., the classified declaration of

and the classified declaration of an unnamed official of the United States; and

HAVING REVIEWED, in addition to the foregoing declarations, the following materials:

a. the memoranda of law submitted by the United States in support of its claim of state secrets privilege and the unclassified declaration of

submitted in support thereof;

b. the memorandum of law submitted by plaintiff in opposition to the aforementioned claim of privilege;

c. the ex parte application of plaintiff for leave to review the Classified Declarations; and

the protective order issued in this action on or about November 21, 1985 (the "Protective Order)"; and

HAVING HEARD the arguments of plaintiff and of the united States at a hearing held on July 27, 1990,

IT IS BY THE COURT this 20 day of August, 1990 ordered as follows:

1. The claim of state secrets privilege of the United States is hereby upheld. The privilege shall extend to those matters identified in the Classified Declarations as requiring the protection of the privilege.

2. The ex parte application of plaintiff for leave to review the Classified Declarations is hereby denied.

3. The terms of the Protective Order are hereby adjudged to be no more restrictive than necessary to protect the information covered by the claim of state secrets privilege upheld hereby.

4. This order shall be filed under seal.

/s/ Richard A. Gadbois, Jr.
RICHARD A. GADBOIS
United States District Judge

Presented by:

/s/ Raphael O. Gomez
RAPHAEL O. GOMEZ
Attorney, Department of Justice
Civil Division, Room 3716
Washington, D.C. 20533
(202) 514-1318

CERTIFICATE OF SERVICE

I hereby certify that copies of the United States' Proposed Order Re: States Secrets Privilege to be filed in camera and under seal were served by Air Borne Express mail, postage prepaid on this 9th day of August 1990 to the following:

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CERTIFICATE OF SERVICE

I hereby certify that on August 14, 1990, a copy of the Proposed Order Re; State Secrets Privilege Field In Camera and Under Seal was mailed, postage prepaid, to:

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APPENDIX C

FILED
FEBRUARY 13, 1991
CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ERWIN RAUTENBERG, et al.,	)	No. 90-70177
	)	
Petitioners,	)	D.C. No. CV-81-4103-RAG
	)	
vs.	)	Central California
	)	
UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA,	)	ORDER UNDER SEAL
	)	
Respondent,	)	
	)	
and	)	
	)	
UNITED STATES OF AMERICA, et al.,	)	
	)	
Real Parties in Interest.	)	
	)	
	)	

Before: CANBY, WIGGINS and BRUNETTI, Circuit Judges

The supplemental emergency petition for Writ of Mandamus is denied. See United States v. Reynolds,

345 U.S. 1 (1953); Bauman v. United States District Court, 557 F.2d 650 (9th Cir. 1977).

APPENDIX C

APPENDIX D

FILED
APR - 1 1991
CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ERWIN RAUTENBERG, et al., Petitioners,	No. 90-70177
vs.	D.C. No. CV-81-4103-RAG Central California
UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA,	O R D E R UNDER SEAL
Respondent,	
and	
UNITED STATES OF AMERICA, et al.,	
Real Parties in Interest.	

Before: CANBY, WIGGINS and BRUNETTI, Circuit Judges

On February 13, 1991, this court issued an order denying the supplemental petition for writ of

mandamus. Petitioners seek reconsideration of that order on the ground that their reply brief was not received by the court before the petition was decided. We grant the motion for reconsideration on that ground. Having considered petitioners' reply brief in support of the supplemental petition, we deny the supplemental petition for writ of mandamus.

APPENDIX E

FILED
APR 29 1991
CLERK, U.S. COURT OF APPEALS

NOT FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ERWIN RAUTENBERG, et al., Petitioners,	No. 90-70177
vs.	D.C. No. CV-81-4103-RAG
UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA, Respondent,	O R D E R
and	
UNITED STATES OF AMERICA, et al., Real Parties in Interest.	

Before: CANBY, WIGGINS and FERNANDEZ, CIRCUIT JUDGES

The panel has voted unanimously to deny the petition for rehearing and suggestion for rehearing en banc.

APPENDIX E

The full court has been advised of the suggestion for rehearing en banc and no judge of the court has requested a vote to rehear the matter en banc.

The petition for rehearing is hereby denied and the suggestion for rehearing en banc is rejected.

Supreme Court, U.S.
FILED
MAR 25 1992
OFFICE OF THE CLERK

No. 91-1136

In the Supreme Court of the United States

OCTOBER TERM, 1991

ERWIN RAUTENBERG, ET AL., PETITIONERS

v.

UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA (UNITED STATES OF AMERICA, ET AL., REAL PARTIES IN INTEREST)

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals abused its discretion in denying a petition for a writ of mandamus directing the district court to vacate a protective order limiting petitioners' dissemination of information protected by the state secrets privilege that they obtained in the course of civil discovery.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	2
Argument	7
Conclusion	19

TABLE OF AUTHORITIES

Cases:

Afshar v. *Department of State*, 702 F.2d 1125 (D.C. Cir. 1983)	16
Air-Sea Forwarders, Inc. v. *Air Asia Co.*, 880 F.2d 176 (9th Cir. 1989), cert. denied, 493 U.S. 1058 (1990)	2, 4, 5, 10, 14
Allied Chemical Corp. v. *Daiflon, Inc.*, 449 U.S. 33 (1980)	10, 11
Bankers Life & Casualty Co. v. *Holland*, 346 U.S. 379 (1953)	10
Bauman v. *United States District Court*, 557 F.2d 650 (9th Cir. 1977)	6
Bryant v. *Yellen*, 447 U.S. 352 (1980)	9
Butterworth v. *Smith*, 494 U.S. 624 (1990)	17
CIA v. *Sims*, 471 U.S. 159 (1985)	17-18
Connally v. *General Construction Co.*, 269 U.S. 385 (1926)	12
Doe v. *State of Florida Judicial Qualifications Conm'n*, 748 F. Supp. 1520 (S.D. Fla. 1990)	17
Douglas Oil Co. v. *Petrol Stops Northwest*, 441 U.S. 211 (1979)	15
Gentile v. *State Bar*, 111 S. Ct. 2720 (1991)	17
International Longshoremen's Ass'n, Local 1291 v. *Philadelphia Marine Trade Ass'n*, 389 U.S. 64 (1967)	12
Kerr v. *United States District Court*, 426 U.S. 394 (1976)	8, 10
Landmark Communications, Inc. v. *Virginia*, 435 U.S. 829 (1978)	15

Cases—Continued: Page

Mallard v. *United States District Court*, 490 U.S. 296 (1989) 8
Miller v. *Casey*, 730 F.2d 773 (D.C. Cir. 1984) 18
National Mortgage Equity Corp., In re, 849 F.2d 1166 (9th Cir. 1988) 8
Roberts v. *United States Jaycees*, 468 U.S. 609 (1984) 12
Roche v. *Evaporated Milk Ass'n*, 319 U.S. 21 (1943) 8
Salisbury v. *United States*, 690 F.2d 966 (D.C. Cir. 1982) 16
Sears, Roebuck & Co. v. *Mackey*, 351 U.S. 427 (1956) 9
Seattle Times Co. v. *Rhinehart*, 467 U.S. 20 (1984) 11, 17
The Florida Star v. *B.J.F.*, 491 U.S. 524 (1989) 15
Totten v. *United States*, 92 U.S. 105 (1876) 11
United States v. *Caparros*, 800 F.2d 23 (2d Cir. 1986) 8
United States v. *Reynolds*, 345 U.S. 1 (1953) 5, 6, 11, 18
Weinberger v. *Catholic Action*, 454 U.S. 139 (1981) 11

Constitution, statutes and rules:

U.S. Const.:
Amend. I 8, 11, 14, 16, 17
Amend. V 11
Due Process Clause 11
Amend. VII 11
Act of Oct. 15, 1980, Pub. L. No. 96-456, 94 Stat. 2025 9
18 U.S.C. App. 9 note (Security Procedures Established Pursuant to Pub. L. No. 96-456, 94 Stat. 2025, by the Chief Justice of the United States for the Protection of Classified Information) 9
§ 7(c) 9
§ 10 9
28 U.S.C. 1291 9

Rules—Continued: Page

Fed. R. App. P.:
Rule 10(a) 9
Rule 10(e) 9
Fed. R. Civ. P.:
Rule 26(b) 2
Rule 26(c) 10, 17
Rule 26(c)(4) 2
Rule 26(c)(7) 2
Rule 54(b) 4, 8, 9

Miscellaneous:

In From the Cold: A Suit Makes Public An Old CIA Tale, National Law Journal (Mar. 2, 1992) 15
A Rare Look at a Sealed File, National Law Journal (Mar. 2, 1992) 15

In the Supreme Court of the United States

OCTOBER TERM, 1991

No. 91-1136

ERWIN RAUTENBERG, ET AL., PETITIONERS

v.

UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA (UNITED STATES OF AMERICA, ET AL., REAL PARTIES IN INTEREST)

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The orders of the court of appeals (Pet. App. C, D) are not yet reported. The order of the district court maintaining in force a previously issued protective order (Pet. App. B) is not yet reported. The protective order is under seal and is not reported.

JURISDICTION

The judgment of the court of appeals denying the petition for a writ of mandamus was entered on February 13, 1991. Pet. App. C. On April 1, 1991, the court of appeals, upon reconsideration, again denied mandamus. Pet. App. D. A petition for rehearing was denied on April 29, 1991. Pet. App. E. The petition for a writ of certiorari was filed on July 29,

1991 (a Monday). See page 7, *infra*. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The background of this private civil action is described in *Air-Sea Forwarders, Inc.* v. *Air Asia Co.*, 880 F.2d 176, 179-180 (9th Cir. 1989), cert. denied, 493 U.S. 1058 (1990). Plaintiff/petitioner Air-Sea Forwarders (Air-Sea), of which petitioner Rautenberg is the President, alleges that in the 1950s, defendant Air Asia Co. arranged for Air-Sea's services as a freight-forwarder and customs broker. Air-Sea further alleges that Air Asia entered into an oral contract in 1956 providing that this arrangement could be terminated only for good cause. At that time, Air Asia was secretly owned and controlled by the Central Intelligence Agency. In 1975, however, the CIA sold Air Asia to defendant E-Systems, Inc., a private corporation. In 1981, Air Asia selected another freight forwarder. Air-Sea then brought this suit against E-Systems and Air Asia in the United States District Court for the Central District of California, alleging wrongful termination of the contract.

Air-Sea sought extensive discovery of the two private defendants and certain matters of interest to the United States. On November 5, 1984, defendant E-Systems sought to limit the scope of Air-Sea's discovery by moving for a protective order under Rules 26(b), 26(c)(4) and 26(c)(7) of the Federal Rules of Civil Procedure. In papers filed on the public record and served on Air-Sea's counsel, E-Systems argued that much of the discovery sought by Air-Sea was not reasonably calculated to lead to admissible evidence. In addition, E-Systems argued that certain information sought by Air-Sea constitutes confidential business information or trade secrets that are privileged from disclosure.

Shortly thereafter, the United States, in an *ex parte, in camera* hearing, presented to the district court several classified declarations supporting E-Systems' motion for a protective order. Air-Sea had served a subpoena seeking information on a wide range of the United States' intelligence related activities, including the manner in which it transports armaments and espionage equipment, confidential relationships with certain private entities, and certain current and past dealings with Asian and Middle Eastern countries. The government's declarations represented that some of the discovery sought by Air-Sea concerned highly sensitive, privileged information whose disclosure would cause grave, immediate, and irreparable harm to the national security of the United States. The declarations then noted that, as E-systems had argued, discovery of such matters could be barred solely on relevance grounds. But they also represented that, in light of the potential for serious injury to national security interests, some of the information sought by Air-Sea would be protected by the state secrets privilege and by specific privileges arising out of two statutory provisions protecting intelligence information.

On November 6, 1984, the district court granted E-Systems' motion and issued a protective order limiting the scope of discovery and evidence that could be adduced at trial. The court found that the information E-Systems sought to protect constituted confidential research, development, and commercial information, and that the information was in any event irrelevant to Air-Sea's claims. In addition, the court expressly found that the information of interest to the United States constituted sensitive national security information that would be subject to a formal claim of state secrets privilege and that was protected from disclosure by several statutory provisions.

The court accordingly directed that no discovery be had and that no evidence be adduced at trial concerning certain contacts with foreign governments and certain information pertaining to whether a confidential relationship existed between the United States and a specified private entity.

In addition, the court took several steps to protect sensitive information reflected in the protective order itself. First, although the court permitted petitioner Rautenberg and counsel for Air-Sea to read the order, it concluded that the order itself is classified and could not be physically retained by either Rautenberg or counsel. Instead, the court instructed the government to maintain the order under seal and in appropriate security containers. Second, the court directed that no party to the litigation may disclose publicly the terms of the order or the United States' participation in the litigation, except insofar as that information appears on the public record. The order, which was amended in certain respects on November 21, 1985,[1] remains under seal.

2. After a trial on the merits, the jury returned verdicts in favor of Air-Sea in the amounts of $216,151.50 in compensatory damages for breach of contract and $6 million in punitive damages for bad faith denial of the existence of a contract. The district court, however, subsequently granted the defendants' motion for judgment n.o.v. on the bad faith claim and their motion for a new trial on the breach of contract claim. 880 F.2d at 181.

Air-Sea appealed the judgment n.o.v. to the Ninth Circuit, pursuant to Fed. R. Civ. P. 54(b). 880 F.2d

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[1] Petitioners erroneously identify the date of the amendments as November 21, 1991. See Pet. 5. The amendments included the addition of the exception to the non-disclosure provision where the United States' interest in the litigation appears on the public record.

at 179 n.1. It did not, however, challenge the validity of the protective order. *Id.* at 192. Air-Sea's appellate brief nonetheless noted that the government had sought a protective order after being informed that discovery requests would implicate classified information relating to a putative relationship between a private entity and the United States. Consistent with the terms of the protective order and its interest in keeping the underlying information confidential, the United States moved that those references be redacted from the publicly filed briefs. The court of appeals granted the government's motion. On the merits, the court of appeals reversed the judgment n.o.v. and remanded for a new trial. *Id.* at 181-191. The court stated in its published opinion that the United States had appeared in the litigation and had obtained a protective order regulating the admission of certain classified evidence. *Id.* at 192. The court did not, however, disclose the specific terms and conditions of the protective order or the details of the underlying information.

3. On April 6, 1990, petitioners, in the course of preparing for the new trial, filed in the court of appeals a petition for a writ of mandamus directing the district court to vacate the protective order. Petitioners filed the mandamus petition under seal. On June 1, 1990, the court of appeals issued an order stating that the petition would be granted unless the government submitted to the district court a certification supporting a claim of the state secrets privilege in accordance with the procedures described in *United States* v. *Reynolds*, 345 U.S. 1, 7-8 (1953). The court of appeals instructed the district court to rule on the privilege and the continuing validity of the protective order, and it retained jurisdiction to review the district court's ruling, which it directed the government

to file with the court of appeals under seal. Pet. App. A1-A2. In addition, the court of appeals, *sua sponte*, stated that its order "shall be filed under seal, and counsel for petitioners shall not reveal [the] order or its contents to anyone not a party to this litigation." *Id.* at A2.

4. On June 29, 1990, the appropriate Executive Branch officer filed with the district court, under seal, a declaration asserting a formal claim of state secrets privilege with respect to information pertaining to the nature, scope, or extent of any governmental relationship with a specified private entity. C.A. Supp. Emergency Petition for Mandamus, Exh. A. The government also filed, under seal and *ex parte*, two additional classified declarations that further detailed the character of the information subject to the privilege and the reasons why disclosure would harm the national security. Pet. App. B2. On August 20, 1990, the district court sustained the government's invocation of the state secrets privilege and the validity of the protective order, *id.* at B1-B5, finding the order to be no more restrictive than necessary to protect the privileged information. *Id.* at B3.

5. On October 11, 1990, petitioners filed in the court of appeals a supplemental petition for a writ of mandamus directing the district court to vacate the protective order or, in the alternative, to modify its restrictions. The court of appeals denied the petition without opinion, citing this Court's opinion in *United States* v. *Reynolds*, *supra*, and its own in *Bauman* v. *United States District Court*, 557 F.2d 650 (9th Cir. 1977), which discusses the standards for obtaining mandamus relief. Pet. App. C1-C2, D1-D2. The court of appeals denied petitioners' petition for rehearing with suggestion of rehearing en banc. Pet. App. E1-E2.

6. On July 29, 1991, petitioners filed a petition for a writ of certiorari and a motion for leave to file the petition under seal. In our October 23, 1991, response to petitioners' motion to file under seal, we stated that the government's interest in preserving the confidentiality of privileged information could be adequately protected by deleting certain material from the certiorari petition (thereby permitting public filing of a redacted copy), if the Court maintained under seal the unredacted petition and any portions of the record or pleadings containing information covered by the state secrets privilege established below. We appended to our response to the motion a redacted copy of the petition that in the judgment of responsible officials could, consistent with the national security, be filed on the public record. Petitioners then filed a new motion to file the certiorari petition, as redacted by the government, on the public record and to file the unredacted petition under seal. On December 3, 1991, the Court granted petitioners' motion.

ARGUMENT

The court of appeals did not abuse its discretion in declining to issue a writ of mandamus to compel the lifting or modification of a protective order entered by the district court to maintain the confidentiality of information that it found to be protected by the state secrets privilege. The court of appeals' brief orders do not conflict with any decision of this Court or of another court of appeals, and do not warrant review by this Court.

This Court has stressed that a writ of mandamus is an extraordinary remedy, warranted only where necessary "to confine an inferior court to a lawful exercise of its prescribed jurisdiction or to compel it to exercise its authority when it is its duty to do so."

Roche v. *Evaporated Milk Ass'n*, 319 U.S. 21, 26 (1943). Accordingly, an applicant for mandamus must demonstrate that there is no other adequate means of obtaining the desired relief, and that his right to issuance of the writ is "clear and indisputable." *Mallard* v. *United States District Court*, 490 U.S. 296, 309 (1989). Moreover, issuance of the writ is largely committed to the discretion of the court to which the petition is addressed. *Kerr* v. *United States District Court*, 426 U.S. 394, 403 (1976). Petitioners ignore these limitations on the relief they sought below.

1. Petitioners had, but chose to forgo, an alternative avenue for challenging the protective order: their prior appeal from the final judgment n.o.v. in favor of Air Asia on the bad faith termination claim. See *United States* v. *Caparros*, 800 F.2d 23 (2d Cir. 1986) (protective order allegedly infringing First Amendment rights appealable upon entry of final judgment); *In re National Mortgage Equity Corp.*, 849 F.2d 1166 (9th Cir. 1988) (discovery order implicating privilege ordinarily appealable upon entry of final judgment). Petitioners argued below that they could not have sought review of the protective order in their prior appeal because: (1) the Rule 54(b) order did not certify the protective order for appeal (see Petitioners' Reply in Support of Emergency Petition For Writ of Mandamus at 31); (2) the protective order was not part of the record on appeal because it was not maintained by the district court clerk (*id.* at 31, 43); and (3) petitioners Rautenberg and Steinberg were not parties to the underlying civil action, and therefore lacked standing to challenge the protective order (*id.* at 33).

Petitioners' efforts to explain away their prior default are unavailing. First, a judgment certified pur-

suant to Fed. R. Civ. P. 54(b) is final for purposes of 28 U.S.C. 1291. *Sears, Roebuck & Co.* v. *Mackey*, 351 U.S. 427 (1956). An appeal thus permits appellate review of all interlocutory orders leading up to entry of judgment. Second, the fact that the protective order was not in the physical custody of the district court clerk had no bearing on the court of appeals' authority to review it. Under Fed. R. App. P. 10(a), the record on appeal consists of all papers filed in the district court, not merely those within the custody of the district court clerk. See also Fed. R. App. P. 10(e); cf. Security Procedures Established Pursuant to Pub. L. No. 96-456, 94 Stat. 2025, by the Chief Justice of the United States for the Protection of Classified Information, §§ 7(c), 10 (18 U.S.C. App. 9 note) (in criminal cases, classified materials may be maintained by Executive Branch agency and later transmitted to reviewing court as part of record on appeal). Third, petitioners Rautenberg and Steinberg, who are Air-Sea's president and counsel, respectively, presumably could have caused Air-Sea to raise the protective-order issue on appeal; if Air-Sea had prevailed, that relief would have redounded to their benefit. Moreover, if Rautenberg and Steinberg believed that Air-Sea's appeal would not vindicate their personal interests in overturning the protective order, they could have intervened in the civil action after entry of judgment, for the purpose of taking an appeal. See *Bryant* v. *Yellen*, 447 U.S. 352, 366 (1980).

There is, moreover, no doubt that the validity of the protective order was germane to petitioners' appeal on the merits. Indeed, petitioners argued that the government's efforts to secure the protective order had prejudiced the district court's view of the evidence and improperly influenced the court in its deci-

sion to enter judgment n.o.v. See 86-6683 Appellant Air-Sea Forwarders Br. at 5-6, 27, 45 (9th Cir.). Yet as the court of appeals pointed out on that appeal, they chose not to contest the validity of the protective order or avail themselves of the opportunity to rectify what they now assert are infringements of their constitutional rights. 880 F.2d at 192. Rather, petitioners waited until *after* the case was remanded to the district court—and until the eve of a new trial —before challenging the order in the court of appeals. Issuance of a writ of mandamus in such circumstances would encourage the waste of judicial resources, subject defendants to the unfair burden of responding to a series of appellate challenges to pretrial rulings, and frustrate the principle that extraordinary writs should not needlessly contribute to piecemeal appellate litigation. See, *e.g.*, *Kerr*, 426 U.S. at 403; *Allied Chemical Corp.* v. *Daiflon, Inc.*, 449 U.S. 33, 35 (1980). For this threshold reason alone, the court of appeals acted well within its discretion in denying relief.

2. In addition, a writ of mandamus may issue only if the petitioner demonstrates a clear and indisputable right to the writ; simple error will not suffice. Put another way, the petitioner must show that there was an abuse of discretion amounting to a naked usurpation of judicial power. *Bankers Life & Casualty Co.* v. *Holland*, 346 U.S. 379, 382-384 (1953). This burden is particularly difficult to carry with respect to orders regulating discovery. The Court has made clear that Fed. R. Civ. P. 26(c) "confers broad discretion on the trial court to decide when a protective order is appropriate and what degree of protection is required," and it has stressed that "[t]he unique character of the discovery process requires that the trial court have substantial latitude

to fashion protective orders." *Seattle Times Co.* v. *Rhinehart*, 467 U.S. 20, 36 (1984). Such discretionary determinations are especially ill suited for mandamus review, for "[w]here a matter is committed to discretion, it cannot be said that a litigant's right to a particular result is 'clear and indisputable.'" *Allied Chemical Corp.*, 449 U.S. at 36.

Petitioners nonetheless argue that the district court's order is erroneous, not because the trial court lacked discretion to regulate discovery or the evidence at trial, but because the order assertedly trenches on their rights under the First and Fifth Amendments.[2] These claims are meritless.

a. Petitioners first contend (Pet. 8-13) that the protective order violates the Due Process Clause of the Fifth Amendment because, while they are faced with the possibility of contempt sanctions for violating the order, they are assertedly unable to ascertain what the order requires of them. This contention is belied by the record.

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[2] Petitioners also include (Pet. 3) the Seventh Amendment among the statement of constitutional provisions involved. They do not, however, mention the Seventh Amendment in the question presented or argue in the body of the petition that the protective order violates their Seventh Amendment rights. Nor could they plausibly do so. This Court has held that "public policy forbids the maintenance of any suit in a court of justice, the trial of which would inevitably lead to the disclosure of matters which the law itself regards as confidential." *Weinberger* v. *Catholic Action*, 454 U.S. 139, 146-147 (1981) (quoting *Totten* v. *United States*, 92 U.S. 105, 107 (1876)). Thus, assertion of a state secrets privilege may warrant dismissal of an entire case if the matter cannot be resolved without disclosure of privileged information. *Reynolds*, 345 U.S. at 7-8. Such a dismissal does not violate a party's right under the Seventh Amendment (where it applies) to have whatever substantive claim is *not* dismissed tried to a jury.

Petitioners rely (Pet. 9, 11-12) on decisions holding that a person may not be subjected to a deprivation of liberty or property based on his failure to comply with a law whose meaning is impermissibly vague (citing *Connally* v. *General Construction Co.*, 269 U.S. 385, 391 (1926); see also *Roberts* v. *United States Jaycees*, 468 U.S. 609, 629 (1984)) or be held in contempt for violating a judicial order that is not drafted with sufficient clarity to permit compliance (citing *International Longshoremen's Ass'n, Local 1291* v. *Philadelphia Marine Trade Ass'n*, 389 U.S. 64, 76 (1967)). At bottom, however, petitioners do not rest their due process claim on the proposition that the protective order itself is "inherently vague." See Pet. 12, 13. Rather, they argue that because they assertedly lack access to the protective order, "[t]he result is the same" as if the order itself were vague.[3] Petitioners' assertion that they have not been adequately apprised of the obligations imposed by the protective order is utterly without merit.

First, petitioner Rautenberg was presented with a copy of the order one day after it was issued. He read the order with counsel at his side and, consistent with the district court's instructions, acknowledged by his signature that he had done so. C.A. Emergency Petition For Writ of Mandamus at 48-49.

Second, when Rautenberg later maintained that a medical condition had caused him to forget the pro-

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[3] Petitioners suggest in a footnote that the order "appears" to suffer from the vice of vagueness as well, but assert that "the limits on access to it preclude the careful study required to determine this with certainty." Pet. 13 n.2. As we explain in the text, however, petitioners' access to the protective order has been more than sufficient to demonstrate to them that the order is not inherently vague.

tective order's requirements, government counsel took additional steps to ensure that he remained adequately apprised of its terms. Thus, government counsel deposed Rautenberg and again presented him with a copy of the protective order. Gov't C.A. Response to Emergency Petition For Writ of Mandamus, Attachment D, at 6-10. Counsel then asked Rautenberg to reread the protective order and inquired whether he understood its terms. Rautenberg, who was represented at the deposition by petitioner Steinberg, responded that he understood each pertinent page of the court's order. *Ibid.* Rautenberg also stated that he understood that he could inspect the protective order again if, at any time in the future, he was unable to recall its terms. *Id.* at 5.

Third, the protective order is and has been available for inspection by Rautenberg's trial counsel upon reasonable request to the Office of the United States Attorney for the district in which Air-Sea's civil action is proceeding. See C.A. Emergency Petition For Writ of Mandamus at 108. At least *seven* of Air-Sea's attorneys, including petitioner Steinberg, have reviewed the order under these procedures, and the district court has permitted additional counsel to be granted access to the order for good cause shown. C.A. Gov't Response to Emergency Petition For Writ of Mandamus, Attachment C, at 3-4.[4]

Finally, the text of the protective order is unambiguous and affords precise notice of the obligations it imposes upon petitioners. It focuses on preserving the confidentiality of information concerning the

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[4] Petitioners state (Pet. 22) that their appellate counsel were denied access to the order, but fail to identify any instance in which those attorneys requested that the district court permit them to inspect it.

existence, nature, and scope of a classified relationship with one, specifically identified private party. Indeed, Rautenberg stated at his deposition that he understood each of the order's provisions, and made no claim that it was vague or imprecise. C.A. Gov't Response to Emergency Petition For Writ of Mandamus, Attachment D, at 7-10.

b. Petitioners also contend (Pet. 14-22) that the protective order violates their First Amendment rights. They principally complain (Pet. 14-19) that the protective order prevents public disclosure even of the existence of the order and of the fact that the government intervened in the litigation to obtain it. Those issues, however, are now moot. By the terms of the protective order itself, disclosure of that information is barred only insofar as it is not a matter of public record. The Ninth Circuit, in its published opinion rendered on petitioners' appeal, has already disclosed (presumably inadvertently) that the district court was in communication with government lawyers concerning the role of classified information and that the district court issued a protective order regulating the admission of classified evidence. 880 F.2d at 192. Because that information is now a matter of public record, petitioners are no longer barred from discussing it. It is for this reason that we represented in our response to petitioners' motion to file the certiorari petition under seal that the government did not object to the public filing of a redacted version of the certiorari petition. And petitioners subsequently made a public filing of the redacted petition, which of course constituted a public disclosure of its contents.[5]

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[5] Petitioners' stated interest in ensuring that the public is made aware of the protective order and the government's efforts to obtain it (see Pet. 14, 16, 17, 22) has also been

At this point, then, the protective order guards only the contents of the order, not its existence and the government's role in securing it. This Court's decisions make clear that the government may preserve the confidentiality of judicial proceedings to further the proper functioning of the judicial system or to prevent public disclosure of certain sensitive information not already in the public domain. See, *e.g.*, *The Florida Star* v. *B.J.F.*, 491 U.S. 524, 534-535 (1989); *Landmark Communications, Inc.* v. *Virginia*, 435 U.S. 829, 845 (1978); *Douglas Oil Co.* v. *Petrol Stops Northwest*, 441 U.S. 211, 218-219 (1979). In this case, the state secrets privilege, which the district court found to have been properly invoked, protects information the disclosure of which would cause grave, immediate, and irreparable harm to the national security of the United States. To ensure that the government would not be required to respond to petitioners' attempt to subpoena such information, the government secured a judicial order. That order itself necessarily contains privileged information in its description of what is protected from disclosure. The mere fact that privileged information is, as a result, reflected in a judicial order does not require that the court make it available for public scrutiny.

Petitioners also err in asserting (Pet. 14-15, 16, 18) that they obtained the information at issue (principally, knowledge of the existence of the protective order) independent of the discovery process, and that the

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served, since that information has been reported in several articles discussing the various suits in which Air-Sea and Rautenberg have been involved with Air Asia. See *In From the Cold: A Suit Makes Public An Old CIA Tale*, National Law Journal 1, 10-11 (Mar. 2, 1992); *A Rare Look at a Sealed File*, *id.* at 10.

First Amendment therefore precluded the court from imposing a prior restraint on its dissemination. The court imposed the protective order in the course of reviewing the United States' request to limit the scope of the discovery sought by petitioners. By defining the scope of the government's privilege against that discovery, the protective order necessarily identified a putative relationship between the United States and a specified private entity. Petitioners apparently had no independent source of that classified information.[6] Indeed, petitioners asserted below that they "flatly do not possess any 'classified' information" (C.A. Supplemental Emergency Petition For Writ of Mandamus at 27 n.11), and they insist in this Court that Rautenberg "has no knowledge of any classified information, and never had any access to such information" (Pet. 9 n.1).

Although the First Amendment narrowly limits a court's power to restrain dissemination of information lawfully obtained through independent means, courts have substantially greater power to limit disclosure of information obtained by a party solely

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[6] Petitioners erroneously suggest that the existence of a classified relationship is public knowledge. See Pet. 16, 19-20. That is not so. The published judicial decision they cite, for example, concerned a public, unclassified contract. The cited newspaper article merely speculates as to the roles of various private parties in aiding intelligence-gathering activities. And the cited reports do not address any current activities, but instead concern events prior to 1975, before the CIA divested itself of Air Asia. The existence of a continuing, classified relationship between the government and the private entity identified in the protective order may well be the topic of public speculation, but, contrary to petitioners' contentions, it is not a matter of public record. Cf. *Salisbury* v. *United States*, 690 F.2d 966, 971 (D.C. Cir. 1982); *Afshar* v. *Department of State*, 702 F.2d 1125, 1130 (D.C. Cir. 1983).

through participation in discovery and other judicial proceedings. *Seattle Times Co.* v. *Rhinehart*, 467 U.S. 20 (1984); *Gentile* v. *State Bar*, 111 S. Ct. 2720, 2744-2745 (1991); *Butterworth* v. *Smith*, 494 U.S. 624, 631-632 (1990); accord *Doe* v. *State of Florida Judicial Qualifications Comm'n*, 748 F. Supp. 1520, 1529 (S.D. Fla. 1990). Thus, in *Seattle Times*, the Court reasoned that "an order prohibiting dissemination of discovered information before trial is not the kind of classic prior restraint that requires exacting First Amendment scrutiny," and further noted that "continued court control over the discovered information does not raise the same specter of government censorship that such control might suggest in other situations." 467 U.S. at 32, 33. The Court also recognized that the government has a substantial interest in ensuring that the discovery process is not abused in a manner that injures third parties. *Id.* at 34-35. For these reasons, the Court held in *Seattle Times* that a protective order limiting dissemination of information acquired in discovery does not violate the First Amendment if it: (1) furthers a substantial governmental interest unrelated to suppression of expression; (2) does not restrict dissemination of information gained from sources outside discovery; and (3) is entered on a showing of good cause as required by Rule 26(c) of the Federal Rules of Civil Procedure. 467 U.S. at 32, 37. The order at issue here satisfies each of those criteria.

First, there is a compelling interest in preserving the confidentiality of the contents of the protective order. The mere assertion of a national security privilege with respect to particular information may itself impart classified information regarding the government's activities. See *CIA* v. *Sims*, 471 U.S. 159,

177 (1985); *Miller* v. *Casey*, 730 F.2d 773, 775-776 (D.C. Cir. 1984). The government should not be put to the choice of either forgoing that assertion or disclosing, in the course of establishing the privilege, the very information it seeks to protect. Cf. *Reynolds*, 345 U.S. at 8 ("The court itself must determine whether the circumstances are appropriate for the claim of privilege, and yet do so without forcing a disclosure of the very thing the privilege is designed to protect." (footnotes omitted)).

Second, the protective order's nondisclosure provisions apply only to the classified relationship that is the subject of the government's state secrets privilege, and do not extend to information that is a matter of public record. As the district court stated, "[t]he thrust of the protective order is not directed to what [Rautenberg] knows. It's to keep him from knowing some things in discovery that he should not know." C.A. Emergency Petition For Writ of Mandamus at 84.

Finally, there plainly was good cause for the order issued below. The government demonstrated to the district court's satisfaction that disclosure of the information in question would cause serious damage to the national security. The protective order is drawn to safeguard that interest without unduly infringing on petitioners' freedom of expression.

3. In sum, petitioners have wholly failed to show that the district court "clearly and indisputably" exceeded its discretion in fashioning protection for classified and privileged information in the discovery context, or that the court of appeals abused its discretion in denying their petition for the extraordinary relief of mandamus. The denial of relief in the particular circumstances of this case does not warrant review by this Court.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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In the Supreme Court of the United States

October Term, 1991

ERWIN RAUTENBERG, et al.,

Petitioner,

v.

UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA,

Respondent.

and

UNITED STATES OF AMERICA, et al.

Real Parties in Interest

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF OF PETITIONERS IN REPLY TO OPPOSITION

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19

QUESTION PRESENTED

Can a Court of the United States, consistent with due process of law, turn a protective order into a secret decree, denying the party required to obey it full access to it and forbidding that party from disclosing its terms or existence to others?

TOPICAL INDEX

Page

QUESTION PRESENTED i

TOPICAL INDEX ii

TABLE OF AUTHORITIES CITED iii

ARGUMENT 1

CONCLUSION 14

TABLE OF AUTHORITIES CITED

Page

Cases

Butterworth v. Smith
(1990) 110 S.Ct. 1376 9

Texts

Levi, *An Introduction to Legal Reasoning*,
(1948) University of Chicago 2

Livy, *The Early History of Rome*
(1973) Penguin 6

Miscellaneous

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BRIEF OF PETITIONERS IN REPLY TO OPPOSITION

I. REAL PARTY IN INTEREST HAS DONE NOTHING TO REFUTE PETITIONER'S SHOWING THAT THE ORDER IS RENDERED INHERENTLY VAGUE BY THE DENIAL OF FULL ACCESS TO IT.

The government contends that its refusal to let Petitioner and his attorneys have a copy of the order has

not reduced their ability to understand it, because the government *has* permitted Petitioner to see the order a few times in the nearly seven years it has been in existence, and has allowed some of his attorneys to see it during that time as well (Opp., pp. 8-10).

Real Party in Interest's argument on this issue misses the point. There is a great difference between, on the one hand, being allowed to read a document even several times under the stress created by limited time, the inability to take notes, official scrutiny, threats and duress, and, on the other hand, having a copy to review over time, as new thoughts germinate and new circumstances arise.

It is a familiar truth in the law that abstract language takes on constantly changing new significance when placed in the context of concrete circumstances as they develop. See Levi, *An Introduction to Legal Reasoning*, 27-31 (U. of Chicago 1948). Thus, language may appear too unimportant to notice in the abstract, but turn out to be of pivotal importance in the particular situation. It is this need to relate the language of the law to an ever-changing and inherently unpredictable reality which makes it essential for lawyers, and judges, to have the texts of statutes and decisions readily at hand, however frequently we may have studied them in the past.

The truth of this point is demonstrated by developments in these proceedings.

Real Party in Interest has conceded that the disclosure of the existence of the order, and of the government's intervention to obtain it, in the Ninth Circuit's published opinion, and this Court's order allowing the Petition herein then to be publicly filed as redacted, have wrought a *de facto* narrowing of the order. Now, Real Party in Interest states "the protective order guards only the contents of the order, not its existence and the government's role in securing it" (Opp., p. 15).

But this is not accurate. Real Party in Interest has revealed aspects of the *content* of the order as well. In its Response to Petitioner's Motion to File Under Seal (which this Court allowed to be filed publicly), Real Party in Interest reproduced verbatim a part of paragraph five of the order. Further, both there (p. 12) and in its Opposition (from which it proposes the seal should be lifted), Real Party in Interest described the order as requiring that

> "no evidence be adduced at trial concerning certain contacts with foreign governments and certain information pertaining to whether a

> confidential relationship existed between the United States and a specified private entity."
>
> Opp., p. 4.

This too makes *partial* disclosure of the content of the order. But just how much is disclosed, and what is it that Petitioner must still keep secret under threat of contempt? Without the opportunity to study the text of the order along with the pleadings which modify it, it is impossible to answer that question with confidence.

While partial disclosure of the order has narrowed its ambit somewhat, therefore, it has made the order more difficult to understand than ever. Now Petitioner must try to conform his conduct, not only with an order of which he has never received a copy, but that order *as modified to an uncertain extent* by a mosaic of partial disclosures in the pleadings which the government has filed publicly in this Court. The inherent vagueness of the order has only been exacerbated by the government's limited disclosures.

Further, Real Party in Interest's picture of access to the order is grossly inaccurate.

First, the stressful conditions set by the government for the occasions on which Petitioner has been allowed to see the order severely hampered his ability to understand and recall it.

On the first occasion described by Real Party in Interest, Petitioner was summarily *ordered* to come to his attorneys' offices to review the order and sign an acknowledgement of it under threat of immediate arrest and prosecution. He signed the acknowledgement only because he felt forced to do so (Declaration of Erwin Rautenberg, attached to Emergency Petition for Writ of Mandamus, paras. 4-7).

Because his tinnitus (Declaration of Erwin Rautenberg attached to Supplementary Petition for Writ of Mandamus, para. 5) made it impossible for him to recall the contents of the order, Petitioner was required to review the order again. This time government

attorneys gave him the impossible task of reading and memorizing the order while suffering under the strain of being deposed by them (Opp., p. 12-13; Declaration of Erwin Rautenberg attached to Petition for Writ of Mandamus, para. 10).

Petitioner's attorneys have been able to review the order only by the time-consuming and burdensome process of first getting permission from attorneys in the Justice Department in Washington (*not*, as the authors of the Opposition well know, by making a "reasonable request to the Office of the United States Attorney for the district in which Air-Sea's civil action is proceeding," Opp., p. 13), and then arranging with attorneys at the Justice Department office in Los Angeles to see it there (see Declaration of Matthew Steinberg, attached to Emergency Petition for Writ of Mandamus, para. 5).

Further, contrary to Real Party in Interest's representation that none of Petitioner's attorneys has been denied access to the order (Opp., p. 13, fn. 4),

Petitioner has described in detail the circumstances under which the author of the mandamus petition, Douglas Mirell, was denied that access (Petition, p. 11, Exh. "I").

To claim, as Real Party in Interest does, that such limited access to the language of the law does not limit the capacity to understand it is to deny not only the values inherent in the First Amendment to the Constitution, but history and common sense as well.

Historically, the crucial move from tyranny to the rule of law is made when a society ceases to give an elite few privileged access to the law, and makes it a public possession. Rome made its most important step from the oppressive monarchy of the Tarquins toward the Republic by the creation of the Twelve Tables, which displayed the text of the laws in the marketplace for all to see. Livy, *The Early History of Rome*, 247 (Penguin 1973). Here, no less than in ancient Rome, those who are governed by the law must be allowed unlimited access to its content if they are to be free of oppression.

In common sense terms, it is apparent that a person who does not have the text of the rules he must live by readily at hand cannot be expected to apply them to changing circumstances as they arise. Yet here, Petitioner is subject to punishment even for *inadvertent* violations of the protective order (Petition for Writ of Mandamus, Exh. "L", p. 2).

The terms of the protective order thus offer this Court a rare opportunity to affirm a principle so fundamental to free government that there has been no previous need for this Court to articulate it: that if free people are to be punished for the violation of legal rules, they must have free and unlimited access to the content of those rules. This Court should take that opportunity and grant the writ.

II. THE PROTECTIVE ORDER IS NO MERE LIMITATION ON DISCOVERY; IT PROHIBITS PETITIONER FROM DISCLOSING TO OTHERS INFORMATION KNOWN TO HIM, BOTH IN AND OUTSIDE OF THE COURTROOM, AND IS THEREFORE A PRIOR RESTRAINT IN VIOLATION OF THE FIRST AMENDMENT.

Real Party in Interest seeks to minimize the protective order's infringement of Petitioner's First Amendment rights by insisting that the order limits only Petitioner's right to discovery, and is not, therefore, an unconstitutional prior restraint (Opp., pp. 15-18).

This is belied by Real Party in Interest's own characterization of the order.

Real Party in Interest states that the order directed *both* that "no discovery be had and that *no evidence be*

adduced at trial concerning" certain matters (Opp., p. 4). If the protective order is directed *only* at limiting discovery, as Real Party in Interest represents (Opp., p. 18), its purpose would be served fully by prohibiting such discovery. There would be no need for the additional prohibition on Petitioner's adducing of such evidence at trial, because Petitioner would have no access to such evidence.

Real Party in Interest also seeks to make the order appear less sinister by describing it as the result of E-Systems' traditional Rule 26 motion to limit discovery, not a government initiative (Opp., p. 3). In fact, however, E-Systems' motion was not granted, but withdrawn. The government was the sole moving force behind the protective order (Response of United States to Petition for Writ of Mandamus, p. 5).

Further, if the order were only a limit on discovery, there would have been no reason for the government's refusal to limit punishment to "knowing and intentional"

violations (Petition for Writ of Mandate, Exh. "L", p. 2). It is hard to imagine how a discovery order could be violated in a manner not "knowing and intentional." Only an order prohibiting Petitioner from disclosing what he already knows to Petitioner could be violated inadvertently.

The order, and particularly its provision for punishment by contempt, is aimed, not at limiting Petitioner's discovery, but at silencing him, both in and out of the courtroom. Contrary to Real Party in Interest's assertions, therefore, it *is* a prior restraint on his freedom of speech, in violation of the First Amendment. *Butterworth v. Smith*, 110 S.Ct. 1376 (1990).

III. THE QUESTION OF WHETHER THERE WERE ADEQUATE MEANS FOR OBTAINING RELIEF FROM THE PROTECTIVE ORDER OTHER THAN BY WRIT OF MANDAMUS IS MOOT.

Real Party in Interest contends that the Circuit Court's decision not to grant Petitioner's Supplementary Petition was justified by the fact that Petitioner had an adequate remedy on appeal which of which he had failed to take advantage (Opp., pp. 8-10).

This argument was timely when Real Party in Interest made it in response to Petitioner's original Petition for Writ of Mandate (Response, p. 11-15). The Circuit Court rejected the argument, however, when on June 1, 1990 it conditionally granted the Petition, remanding the matter to the District Court, and retaining jurisdiction to review the District Court's disposition (Petition for Certiorari, Appen. A). In deciding to take substantive action on the petition, the Circuit Court

necessarily exercised its discretion to find that extraordinary relief *was* appropriate in this case, and to *grant* such relief.

In order to renew the "threshold" contention that a grant of extraordinary relief would be a "waste of judicial resources" (Opp., p. 10), therefore, Real Party in Interest must argue that the Circuit Court *abused* its discretion in granting the June 1, 1990 order.

But Real Party in Interest has not done this. Instead, Real Party in Interest purports to *defend* the Circuit Court's exercise of discretion in denying Petitioner's *Supplementary* Petition (Opp., pp. 9-10). Because, however, the Circuit Court denied the supplementary petition only after it had made its June 1, 1990 order and the District Court had carried out that order (Opp., pp. 6-7), the Circuit Court could not possibly have rejected the Supplementary Petition on the basis of a "threshold" judgment that Petitioner had no need to seek extraordinary relief from the protective order.

As, therefore, the threshold issue of the propriety of extraordinary relief was decided by the Circuit Court's order of June 1, 1990, it is now moot, and there is no reason for this Court to give it further consideration.

IV. REDACTED FOR PUBLIC FILING

CONCLUSION

It is time to end the elaborate system of artifice, including the filing with this Court of documents under seal or in redacted form, by which this protective order protects from public scrutiny information already known to all. This Court should grant the writ and squarely face the question of whether Real Party in Interest can justify the extraordinary departure from the rule of law inherent in this secret protective order.

For the reasons stated, Petitioner respectfully requests that the writ be granted, and that this Court give full consideration to the issues it raises on the merits.

In the alternative, Petitioner respectfully requests that this Court grant the writ and dispose of it summarily, modifying the protective order by striking the provisions that limit access to and disclosure of the order itself (or *at least* modifying it to reflect the de facto modifications already affected by this Court's order allowing the public filing of the redacted Petition).

Respectfully submitted,

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